

Thirteen Ways of Looking at *Buck v. Bell*: Thoughts Occasioned by Paul Lombardo's *Three Generations, No Imbeciles*

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Introduction

Paul Lombardo's recent book, *Three Generations, No Imbeciles: Eugenics, the Supreme Court and Buck v. Bell*,¹ chronicles the history of state-sponsored sterilization over the course of the 20th century. As a historical endeavor, it is rich and rewarding, permitting the reader a broad understanding of the social, cultural and legal context for the case that inspired Oliver Wendell Holmes' famous quotation, "Three generations of imbeciles are enough."² Lombardo's work masterfully ties the eugenics movement of the early 20th century to the broader policies informing the government's role in regulating reproduction.

Equally important as the excavation of this history is the manner in which Lombardo's writing surfaces the emotional consequences of fertility-related policies. The grace of Lombardo's work lies in his unwavering focus on the individuals whose lives were altered by their inability to have children. The result is a book that is far more than a story about a long-gone era. It is also a book laden with open questions and challenges for contemporary policy-

Michelle Oberman is Professor of Law, Santa Clara University School of Law. With apologies and gratitude for the inspiration provided me by Wallace Stevens' poem, *Thirteen Ways of Looking at a Blackbird*. Originally written in 1917, this poem has been anthologized in many collections, including *Wallace Stevens: Collected Poetry and Prose* (Library of America 1977) at 74. Profound thanks are owed to Lorraine Sachiko (Santa Clara Law School Class of 2008), for helping me transform a very rough draft into an article I could actually write, and to Jean Love, Pat Cain, and Dean Donald Polden at Santa Clara University School of Law for unflagging support. Special thanks also to Molly Selvin for providing superlative editorial assistance. This essay is dedicated to Paul Lombardo, who embodies the perfect balance of passion and dispassion needed to produce enduring and meaningful contributions to our collective understanding of the law and of what we aspire to call civilization.

1. Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (The John Hopkins University Press 2008).
2. *Buck v. Bell*, Superintendent, 274 U.S. 200, 207 (1927).

makers. For instance, what is the significance of reproduction to the individual, and what role should the state play in response to its citizens' reproductive capacities and desires?

Lombardo's book, which I originally picked up solely because of my interest in eugenics in the U.S., is so thought-provoking that the academic in me could not help but envision it as an ideal foundation for a semester-long class, with a week devoted to each of a number of themes expressly or inherently raised by the text. I took the bait, and have organized this essay into thirteen themes that struck me as particularly noteworthy and deserving of exploration. Of course, the book's value extends far beyond the academy, and I don't mean this organizational device to suggest that this book is intended primarily for classroom use. On the contrary, it is accessible to lay and professional audiences alike. Indeed, it is so smoothly written that one hardly notices how much one is learning while turning the pages.

Like Lombardo's book, this essay is neither fish nor fowl—it is neither a book review nor is it a course proposal. Although I have used Lombardo's book twice now as the central text for a semester-long seminar entitled "Government Regulation of Reproduction," this essay is less a syllabus than an exploration of the tangents that seem to emanate from Lombardo's historical tale. The themes upon which Lombardo touches may be grouped into three general categories: the state role in regulating fertility; gender, race, and class issues in fertility regulation; and contemporary reproduction-related politics as they pertain to human attributes. In the pages that follow, I describe each of these general categories, and present a taste of the various issues, themes, or meditations suggested by Lombardo's project.

I. The State and Fertility Regulation

In retrospect, the core story of *Buck v. Bell* is the hubris with which the government of the state of Virginia, with the imprimatur of the United States Supreme Court, assumed the authority to strip certain classes of human beings of their capacity to bear children. Lombardo's early chapters tell this story in vivid detail, taking the reader well beyond the familiar words of Holmes' proclamation to explore the manner in which citizens gradually ceded such authority to the state. In the end, though, Lombardo's story reveals that it was no anonymous "state" that sterilized Carrie Buck and others. Instead, sterilization laws were the progeny of a cadre of earnest, self-righteous, misguided, and occasionally delusional individuals.

A. Theme One: The History of Eugenics

Any effort to understand the laws that permitted state governments to sterilize their citizens is helped by a thorough discussion of the history of eugenics. Chapters 1 through 6 of Lombardo's book provide an excellent description of the early 20th century eugenics movement, bringing the most prominent advocates of this philosophy to life in vivid detail.

Carrie Buck's sterilization was just one by-product of decades of work by a small group of intellectuals and advocates who were deeply engaged in what they viewed as an effort to improve the human species, or at least those who lived in the United States. Lombardo's study reveals them to be individuals who saw themselves as leaders of their generation, whose eugenics-based activism was imbued with their conviction that they had a deep responsibility to protect and promote the future of civilization.

There never was a broad consensus in favor of eugenic policies, nor were sterilization laws passed on a whim. Instead, in state after state, there was a surprisingly robust debate about when and whether the state should invoke the authority to sterilize a certain class of citizens.³ Sterilization laws, when they passed, were not reflections of a unanimous desire of the people to purge the nation of those it deemed unworthy. Instead, they were the product of persistent lobbying by a committed group of individuals.

The bulk of Lombardo's history focuses on Virginia, the state that enacted the law that authorized Carrie Buck's sterilization. The Virginia law was the culmination of decades of work by several proponents of eugenics. Each had championed eugenics individually before their paths crossed.

Heredity studies in the U.S. began in the late 19th century, triggered by the discovery of genes.⁴ In classic scientific tradition, work began by classifying what could be observed about genes in the hope that eventually scientists would come to understand the link between genes and human traits. In 1910, a private office, the Eugenics Research Office (ERO), was established in New York. Run by Harry Laughlin, a former teacher from Missouri, it was richly endowed by America's leading corporate giants, including the Carnegie Foundation, John D. Rockefeller, and railroad magnate E.H. Harriman.⁵ The lack of scientific proof linking liking genes to expressed human traits failed to forestall the ERO's move from descriptive "pedigree studies" to proclamations in favor of sterilization as a solution to the strain on society presented by "defective and delinquent classes of the community."⁶

Although eugenic sterilization always had its detractors, the crusade for sterilization took hold in numerous states.⁷ Among these advocates was Dr. Albert Priddy, the superintendent of the Virginia State Colony for Epileptics and the Feebleminded. As early as 1911, Dr. Priddy began calling for legalized eugenics. In support of his campaign for sterilizing inmates whom he deemed

3. Lombardo, *supra* note 1, at 20ff (Chapter 2) (chronicling the movements for and opposition to early, pre-Buck eugenics laws, including laws in PA, MA, MI, IN, WA, NJ). *See also id.* at 53 (presenting legal critiques of Laughlin's Model Law, which was the foundation for the VA law).

4. *Id.* at 30 (describing the influence of Mendelian theory on early eugenicists).

5. *Id.* at 31-32.

6. *Id.* at 36, 47.

7. *See id.* at 24-29 (chronicling states with laws promoting sterilization). *See also id.* at 58 (noting the American Bar Association's condemnation of the practice).

“immoral,” “overly fond of men,” or those with “a reputation for promiscuity,” he conducted extensive research among inmates in his facility, and traveled to states with more liberal policies.⁸ Eventually, Priddy began sterilizing women inmates in the Virginia State Colony under his own interpretation of a 1916 Virginia law that allowed surgery designed to benefit the “physical, mental or moral” condition of inmates.⁹

Over time, Dr. Priddy’s overreaching brought him trouble. Along with a state probation officer, Priddy focused on the Mallory family, a poor family with many children and a history of struggling with work, alcoholism, and domestic violence.¹⁰ Priddy arranged to have the mother and two daughters, ages fifteen and thirteen, committed to the Virginia Colony on the grounds of hereditary mental deficiency.¹¹ It took several weeks for Mr. Mallory to learn what had happened. Then he and his family immediately began to petition for their release. Mrs. Mallory was sterilized by the time Mr. Mallory secured a lawyer and sued Dr. Priddy and the Virginia Colony.¹² The lawsuit, which voided the detention of the Mallory girls and justified Mrs. Mallory’s sterilization only on the grounds of a “medical emergency,” rather than on the broader eugenic grounds invoked by the defense, convinced Priddy of the need for clearer legal mandates in order to proceed with his plan for eugenic sterilization.¹³

In reworking Virginia law to permit eugenic sterilization, Dr. Priddy found an ally in the idealistic eugenics proponent, Harry Laughlin, who had drafted “A Model Sterilization Law” in 1914.¹⁴ By 1920, Laughlin was regarded as an international expert in eugenic sterilization.¹⁵ Two years later, he published his “Eugenical Sterilization in the United States,” which contained his Model Law.¹⁶ In 1921, Priddy joined forces with Aubrey Strode, the attorney for the State Colony for Epileptics and Feeble-minded, who worked with him to lobby for the law’s passage in the Virginia General Assembly.¹⁷ The Virginia Sterilization Act of 1924 was drafted by Aubrey Strode; parts of it copied almost verbatim parts of Laughlin’s Model Act.¹⁸

8. *Id.* at 61.

9. Lombardo, *supra* note 1, at 60.

10. *Id.* at 65.

11. *Id.* at 67.

12. *Id.* at 68.

13. *Id.* at 77.

14. *Id.* at 51.

15. Lombardo, *supra* note 1, at 78.

16. *Id.* at 85.

17. *Id.* at 100.

18. *Id.* at 99-100.

The Virginia Sterilization Act of 1924 illustrates the twin rationales eugenics advocates, such as Priddy, Strode, and Laughlin, promoted in support of eugenic policies. First, they asserted that sterilization was truly humane for the individual concerned. Second, they convinced others that the welfare of their community, their state, and indeed the country would be enhanced if specific classes of individuals did not bear children. The Act's "procedural safeguards," mandatory after the *Mallory* case, provided that if a superintendent of a state hospital or the State Colony for Epileptics and the Feeble-minded is "of the opinion that it is for the best interests of the patients and of society" to sterilize an inmate, he may do so as long as he complies with the Act's requirements.¹⁹ These requirements included petitioning the given institution's board of directors, serving the inmate's legal guardian with the petition, and convening a special board to hear the petition and other allowed forms of legal evidence, including the inmate's commitment papers and depositions. At the special board, all parties were entitled to legal counsel. The superintendent or the inmate could appeal the special board decision to the circuit court, then to the Supreme Court of Appeals. The Act also provided that "neither any of said superintendents nor any other person legally participating in the execution of the provisions of this act shall be liable either civilly or criminally on account of said participation." Here was the protection against litigation Priddy had sought after his loss in the *Mallory* case.

The world Lombardo describes in this part of his history was in many ways smaller than our own. In the end, its intimacy enabled sterilization proponents to orchestrate the passage of Virginia's law and to ensure it would withstand legal challenge. The interconnected nature of the community of advocates of state-sponsored sterilization included Justice Oliver Wendell Holmes, author of the United States Supreme Court's opinion in *Buck v. Bell*. As Lombardo points out in his first chapter, Justice Holmes' father, the famous poet and essayist, wrote an extended essay about heredity, "moral idiocy," and the "deep-rooted moral defects" criminals passed to their offspring.²⁰ Justice Holmes echoed his father's beliefs when writing the opinion for *Buck v. Bell*.

B. Theme Two: A Serious Re-Reading of Buck v. Bell

Many have excoriated *Buck v. Bell*, counting it among the most notorious United States Supreme Court decisions of the 20th century.²¹ It is easy to see why it should be regarded as such, given the false factual premises of the ostensibly scientific record upon which it was predicated. As Lombardo's title concludes, even under prevailing medical standards of the 1920s, Carrie Buck,

19. *Id.* at 288ff.

20. *Id.* at 9.

21. See, e.g., Ana Romero-Bosch, Lessons in Legal History—Eugenics and Genetics, 11 Mich. St. J. Med. & L. 89, 96 (2007) (discussing the "infamous" case of *Buck v. Bell*); Sonia M. Suter, A Brave New World of Designer Babies?, 22 Berkeley Tech. L.J. 897, 909-14 (2007) (criticizing the "shoddiness" of *Buck v. Bell*).

her mother, and her daughter were not “imbeciles.” Instead, they were poor women who were vulnerable to coercion and abuse at the hands of others, including the state.

To dismiss the opinion outright is too easy, though. Instead, it is worth probing the extent to which Holmes’ sense of the relationship between the individual and the state has any lingering validity. Holmes’ opinion rests upon two policy-based arguments. First, he concludes that some individuals are so ill-suited for parenthood that they should not be permitted to become parents. He predicates this determination on the grounds that their offspring are destined to become burdens on the state.²² Second, he argues that, because the state may require soldiers to sacrifice their lives on its behalf, it must *a fortiori* be permitted to require lesser sacrifices, including sterilization, of others.²³

Both of these arguments merit consideration prior to dismissal. The first is easy to fault on grounds of ambiguity. Precisely which individuals are to be considered ill-suited for parenthood? And even if it were possible to identify a class of individuals incapable of rearing children, what is the metric by which the state is to judge the extent to which their offspring are likely to become burdens? Holmes’ opinion rests heavily on now-discredited faith in genetic inheritance, and the assumption that a relatively unintelligent mother will produce a relatively unintelligent child.

One can ridicule Holmes’ misplaced faith in eugenics, and yet, one also can find vestiges of it in contemporary social policies pertaining to reproduction. Virginia’s sterilization law was neither the first nor the last attempt by a government to influence its citizens’ child-bearing decisions.²⁴ Sterilization is the most extreme of such policies, to be sure, and Lombardo provides a detailed account of the contemporaneous laws in other states and nations that advanced government-supported or government-mandated sterilization.²⁵ But there are myriad less overt examples of government policies that attempt to encourage or discourage reproduction. Sometimes these policies are indirect, as in tax deductions or child allowances, which might encourage reproduction, or welfare policies that might discourage childbearing by capping the amount of state support for poor women.²⁶ Some policies are less subtle in their intent.

22. *Buck v. Bell*, 274 U.S. at 207.

23. *Id.*

24. See discussion *infra* Part III.1.

25. See, e.g., Lombardo, *supra* note 1, at 20 (regarding medical experimentation on men and women in institutions); *id.* at 239–40 (regarding experimental sterilization programs in the U.S.); *id.* at 248 (regarding the “massive sterilization” of Native Americans at Indian Health Services facilities throughout the U.S.). A more detailed discussion of these policies is found below. See *infra* section II, C Race & Eugenics.

26. *Id.* at 275 (providing the example of a proposed 2007 New Mexico bill requiring mothers of any baby born with fetal alcohol syndrome (FAS) to receive contraceptive injections. If such a mother has a second child with FAS, the bill proposed court ordered sterilization). See

Consider, for instance, premarital testing laws and policies, which often are designed to discourage reproduction by those whose offspring might bear a disproportionately high risk of abnormality.²⁷

Buck v. Bell's second assertion—that a government claiming the right to conscript soldiers into mortal combat surely has the right to demand lesser sacrifices from its citizens—is not as readily dismissed. Holmes surely is right in noting the hypocrisy of claiming a government has no right to demand non-life-threatening or “lesser” physical sacrifices from its citizens, while at the same time maintaining a mandatory draft. Living in an era of voluntary conscription, we might ignore his challenge. The fact of the matter is that we live today with this hypocrisy.

For example, in the name of public health, the government is empowered to and in fact does make demands of citizens.²⁸ State governments typically require children to receive certain vaccinations prior to matriculation into public schools.²⁹ Some states have implemented policies collecting corneas from cadavers—a policy designed to enhance the supply of corneas available for transplantation, a procedure routinely required by a significant percentage

also id. at 242 (describing a 1956 bill proposed in Virginia, which would have allowed public welfare officials to initiate sterilization proceedings against women who had given birth to more than one illegitimate child).

27. *Id.* at 46 (noting that laws requiring testing for syphilis or other conditions that affected fertility were routinely labeled “eugenic marriage laws”). *See generally* Michael Closen, Robert Gamrath, & Dem Hopkins, Mandatory Premarital HIV Testing: Political Exploitation of the AIDS Epidemic, 69 Tul. L. Rev. 71 (1994), for a discussion of “mandatory premarital HIV testing” statutes, including the Illinois and Louisiana statutes that were passed and later repealed in the late 1980s. These statutes were illogical as public health measures, being predicated upon false assumptions—e.g. that couples do not engage in premarital sexual contact, and that, once married, couples remain monogamous. *See generally* Lainie Friedman Ross, Heterozygote Carrier Testing in High Schools Abroad: What are the Lessons for the U.S.?, 34 J.L. Med. & Ethics 753 (2006), for a discussion of voluntary prenatal carrier testing, such as Tay-Sachs Disease screening, which is offered to prevent births of children with fatal genetic abnormalities.
28. The Tenth Amendment to the U.S. Constitution reserved “police powers” related to health, safety, and welfare to the states.
29. All states have laws conditioning school enrollment upon vaccinations, however states vary slightly on which vaccinations are required and on the exceptions to these laws. *See, e.g.*, James G. Hodge & Lawrence O. Gostin, School Vaccination Requirements: Historical, Social, and Legal Perspectives, 90 Ky. L.J. 831, 869–73 (2002) (delineating all state school vaccination laws as of 2002 and noting, for example, that some states require mumps vaccinations while some do not). Nearly all states allow religious or “philosophical” exemptions to mandatory state school vaccination laws, though such exemptions are controversial and often challenged. *See generally* Alicia Novak, Comment, The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges, 7 U. Pa. J. Const. L. 1101 (2005). Every state except Mississippi and West Virginia offers religious exemptions, but only twenty states offer philosophical exemptions. *See* The National Conference of State Legislatures’ chart of “States With Religious and Philosophical Exemptions From School Immunization Requirements” (2008), *available at* <http://www.ncsl.org/programs/health/SchoolExempLawsChart.htm> (last visited Mar. 3, 2009).

of the population.³⁰ Even though the extractions involve cadavers rather than living citizens, the cornea extraction laws and their “presumed consent” provisions have seen their fair share of controversy.³¹

In spite of the broad public health powers given to states by the U.S. Constitution,³² proposals to curtail individual rights in the name of protecting the general welfare remain relatively rare and are met with great resistance. For instance, proposals to increase the organ supply by creating a presumption in favor of donation with opportunities to opt out, as opposed to the present policy, which requires solicitation of next of kin, have been universally rejected.³³ Nor has there been any significant support for creating mandatory universal bone marrow typing programs, although it is clear that bone marrow donations can save lives, that they are relatively harmless to the donor, and that the only barrier to saving more lives is the limited number of “matching” donors currently registered as volunteers.³⁴

30. According to the Eye Bank Association of America, “[c]orneal transplant is one of the most frequently performed human transplant procedures. Since 1961, more than 549,889 corneal transplants have been performed, restoring sight to men, women, and children ranging in age from nine days to 103 years.” Eye Bank Association of America’s “Frequently Asked Questions,” available at <http://www.restoreight.org/general/faqs.htm#5> (last visited Mar. 3, 2009). See Michele Goodwin, Formalism and the Legal Status of Body Parts, 2006 U. Chi. Legal F. 317, 330, n.48 (2006), for a list of states that have passed cornea extraction laws.
31. See Goodwin, *supra* note 30, at 331, n.50 (citing S. Gregory Boyd, Comment, Considering a Market in Human Organs, 4 N.C. J. L. & Tech. 417, 441 (2003) (discussing a Florida court’s characterization of corneal removal as a small intrusion) and Marie-Andree Jacob, On Silencing and Slicing: Presumed Consent to Post-Mortem Organ “Donation” in Diversified Societies, 11 Tul. J. Int’l & Comp. L. 239, 254–55 (2003) (describing the criticism that presumed consent is unethical)).
32. As Professors Lawrence Gostin and James Hodge note, citing Professor Judith Areen, “In the realm of public health, the Constitution acts as both a fountain and a levee. It originates the flow of power to preserve the public health and it curbs that power to protect individual freedoms.” Lawrence O. Gostin & James Hodge, Jr., The Public Health Improvement Process in Alaska: Toward a Model Public Health Law, 17 Alaska L. Rev. 77, 85, n.21 (2000).
33. Note that in many European countries, an individual is presumed an organ donor unless he/she expressly declares otherwise; as a result, 90 percent of people in these countries are organ donors. See Jane E. Brody, The Solvable Problem of Organ Shortages, N.Y. Times, Aug. 28, 2007, available at <http://www.nytimes.com/2007/08/28/health/28brod.html> (last visited Dec. 10, 2009). Proposals for a similar organ donation scheme in the U.S. are strongly disfavored, as Americans view organ donation as a deeply personal choice. See, e.g., Scott Carney, The Case for Mandatory Organ Donation, Wired Magazine, May 8, 2007, http://www.wired.com/medtech/health/news/2007/05/india_transplants_donorpolicy (last visited Mar. 3, 2009) (describing the mandatory organ donation plan proposed by two U.S. medical school professors).
34. In the legal and ethical debates regarding bone marrow donation, proponents for mandatory bone marrow registries and mandatory bone marrow donation have not prevailed because “no value is more thoroughly entrenched in American culture than is the notion of privacy”; individual privacy rights are eroded if the government decides when one person’s tissue should be invaded or “harvested” for the benefit of another. Rhonda G. Hartman, The Privacy Implications of Professor Anderson’s Proposed Mandatory Registry for Bone Marrow Donation: A Reply, 54 U. Pitt. L. Rev. 531, 531, 548–50.

From a public health perspective, Holmes' opinion is well-grounded in federal and state constitutional law. And yet, the reality seems to be that the government today makes relatively minor express demands of its citizens' bodies, virtually always providing an opportunity for them to object and exempt themselves. For instance, the extent to which suggestions that it was time to re-impose a universal draft, triggered by the unpopular U.S. war in Iraq, were met with scorn, silence, and eye-rolling.³⁵ As Lombardo discusses in his epilogue, one further legacy of *Buck v. Bell* is to force us to question the extent to which we actually are willing to empower our government to pursue communitarian goals when they conflict with individual liberty.³⁶

C. Theme Three: Lawyers Behaving Badly

Lombardo's book reveals a treasure trove of professionalism questions for lawyers. To begin with, he unveils significant chumminess, if not outright collusion, among the professionals involved in the case. The "teamwork" started before Carrie Buck was identified as a potential candidate for sterilization, but nowhere was it more troubling than in the manner in which the lawyers for the state, the defense, and the judges worked together to insure the law would be upheld and Carrie would be sterilized. In Chapters 8 through 12, Lombardo chronicles the depth and extent of the collaboration between the key players behind *Buck v. Bell*.

As Lombardo states in his Introduction, the *Buck* case was not just a tragedy, it was "a legal sham."³⁷ Lombardo's research revealed that lawyers orchestrated the case for the state-operated Virginia Colony for Epileptics and Carrie Buck's court-appointed attorney, Whitehead. The case began when Aubrey Strode, an attorney and the author of the Virginia sterilization statute, approached the Colony. Strode urged its head doctor, Dr. Albert Priddy, to choose a patient who would have standing to "oppose" the law. Dr. Priddy chose Carrie Buck. The Colony then chose and hired Carrie's attorney, Whitehead, who Lombardo reveals to be the "confidant of Priddy, boyhood friend of Aubrey Strode, former Colony director, and [a] sterilization advocate."³⁸ Indeed, the Colony had a building named after Mr. Whitehead.³⁹ Whitehead was less than

35. For example, U.S. military and national security experts recommended that President Bush alter his goals to fit the military resources of the current volunteer army, rather than reinstate a universal draft. Fred Kaplan, *The Army, Faced with its Limits*, N.Y. Times, Jan. 1, 2006. Also, in the second year of the Iraq War, the U.S. House of Representatives voted against the Universal National Service Act of 2003, which proposed "that all young persons in the United States, including women, perform a period of military service or a period of civilian service in furtherance of the national defense and homeland security...." Universal National Service Act of 2003, H.R. 163, 108th Cong. (2004).

36. Lombardo, *supra* note 1, at 274.

37. *Id.* at xi.

38. *Id.* at 107.

39. *Id.* at 133.

a zealous advocate for Carrie at the trial, which lasted only five hours,⁴⁰ and when the case went before the United States Supreme Court, his arguments were “sketchy at best.”⁴¹ Not only was he on the opposing party’s payroll, Whitehead also attended Colony board meetings to discuss the trial court decision and to remind the Colony that the case would likely progress to the United States Supreme Court.⁴² In Chapter 10, Lombardo discusses evidence that was readily available and could have been used in Carrie Buck’s defense. These included experts, literature, studies, and individual examinations of Carrie and her daughter. Instead, her attorney insured his client lost her case. Whitehead’s “grossly negligent”⁴³ performance led many to observe it was as if Priddy had two attorneys and Carrie had none.⁴⁴

The story of this collaboration raises important issues for scholars and teachers of professional responsibility, calling attention to its hazards in cause-based lawyering, as well as to the consequences of the test-case model of jurisprudence in the wake of a “successful” test. The morally and legally abhorrent behavior documented in Lombardo’s history helps set a baseline against which one might readily consider more ambiguous documentation of the “casualties” of cause lawyering.⁴⁵ For example, Kevin McMunigal’s thought-provoking essay contrasting lawyer Sarah Weddington’s view of *Roe v. Wade* with Norma McCorvey (Jane Roe’s) experience of the abortion litigation raises similar issues about the extent to which a lawyer can effectively represent both her client and a political cause.⁴⁶ These risks are enhanced to the extent

40. *Id.* at 135.

41. *Id.* at 157–58.

42. Lombardo, *supra* note 1, at 150.

43. *Id.* at 154.

44. *Id.* at 127.

45. See generally Austin Sarat & Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998) (exploring the ethical dimensions of lawyers who choose clients and tailor cases to pursue the lawyers’ own respective agendas). See Susan D. Carle, Symposium, *How Should We Theorize Class Interests in Thinking about Professional Regulation?: The Early NAACP as a Case Example*, 12 *Cornell J.L. & Pub. Pol’y* 571, 571–84 (2003), for a rich discussion of how early NAACP “test cases” were contrary to established rules of legal ethics. As with the attorneys on both sides of Carrie Buck’s case, the NAACP “actively created litigation where none would have existed otherwise” and “solicited” plaintiffs in order to create the litigation. Both tactics violated rules of legal ethics at the time. Most notably, the early NAACP test case attorneys were white “elitists” who purported to litigate in the best interests of African Americans, but who in fact promoted the interests of their own class.

46. Kevin C. McMunigal, *Essay, Of Causes and Clients: Two Tales of Roe v. Wade*, 47 *Hastings L.J.* 779, 784 (1996) (explaining that in spite of her professional obligations to place her client’s needs ahead of any other goals, Weddington consistently maintains she brought the Roe case on behalf of “women such as the abortion project volunteers” and women in general).

that the client is relatively disenfranchised, whether for reasons of class, race, gender, or lack of education. All of these factors played into both Carrie Buck's and Norma McCorvey's experiences with the legal system.⁴⁷

As a cautionary tale for test-case methodology, *Buck v. Bell* also provides an excellent example of the manner in which, once upheld by a court, a law may quickly be applied in situations well beyond those contemplated by the initial case. In this instance, after "cooking" the evidence to suggest that sterilization was justified because Carrie Buck was one of three generations of women whose low intelligence rendered them incompetent as mothers, the state of Virginia (among others) was permitted broad sway in implementing its new law. The result was an expansion of the categories of those considered appropriate candidates for sterilization to the point where the law moved beyond its moorings in eugenics to embrace the sterilization of "moral degenerates" and criminals.

D. Theme Four: Doctors as Agents of the State, Then and Now

The story of state-sponsored sterilization also may be seen as an example of doctors sacrificing their professional integrity by forming alliances with the state. Obviously, the sterilization laws could not have been implemented without doctors willing to work with the state to purge the population of the threat it saw in the reproductive capacity of a subset of its population. A student of health law, and in particular of public health law, should have little trouble seeing eugenics programs as familiar when considered in the context of other instances of moral panic. In the name of promoting the best interests of their patients and their country, health care professionals have participated in dubious medical endeavors throughout history and today—torture and medical experiments carried out upon uninformed or non-consenting individuals, testing pregnant women for evidence of substance abuse without first obtaining informed consent, and participating in executions, just to mention a few.⁴⁸

47. *Id.* at 786–90.

48. An example of doctors participating in non-consensual, racially discriminatory drug tests of predominately poor, black women just after they gave birth occurred at the Medical University of South Carolina. See Kathleen R. Sandy, *The Discrimination Inherent in America's Drug War: Hidden Racism Revealed by Examining the Hysteria Over Crack*, 54 Ala. L. Rev. 665, 684–90 (2003) (discussing the "crack baby" myth perpetuated by the media in the 1980s, which gave rise to prenatal and postnatal drug testing for mothers and infants, such as that by the Medical University of South Carolina). See generally Donald P. Judges, *The Role of Mental Health Professionals in Capital Punishment: An Exercise in Moral Disengagement*, 41 Hous. L. Rev. 515 (2004), for a discussion of doctors participating in capital punishment executions. A contemporary example of doctors participating in government-sponsored torture is the U.S. military prison Abu Ghraib. See Jennifer E. Lloyd, Note, *Primum non nocere: Singleton v. Norris and the Ethical Dilemma of Medicating the Condemned*, 58 Ark. L. Rev. 225, 247–48 (2005) (describing Abu Ghraib as a place in which,

Lombardo surfaces this theme via a succinct, yet powerful discussion of the Nazi medical experiments that took place in World War II concentration camps, set alongside the U.S. history of non-consensual medical experiments performed on patients in state institutions and asylums.⁴⁹ Other examples of doctors compromising their ethical obligations to their patients in the name of carrying out state policy abound. One particularly relevant contemporary analogy to the role of doctors in state-sponsored sterilization campaigns is the manner in which state and federal governments have attempted to enlist doctors in the “fight” against illegal immigration. In a recent article, Professor Brietta Clark documents the various efforts to require emergency room doctors and other hospital personnel to determine their patients’ immigration status.⁵⁰

E. Theme Five: Public Choice Theory and Eugenics Laws

Lombardo’s history of *Buck v. Bell* and the American foray into eugenics provides an excellent illustration of public choice theory at work at the intersection of public policy, private health, and the law. Public choice theory emerged in the 1950s, in an effort to apply the tools of microeconomics to the analysis of governmental actions.⁵¹ Generally speaking, public choice theorists demonstrate the manner in which self-interest can lead to distortions in the political process. This happens when a coalition seeking some specific advantage devotes their resources to rally the state into action, and succeeds because their concentrated interests are more readily perceived by legislators than are the diffuse opposing interests of the general citizenry.

Lombardo’s account demonstrates the ongoing presence of opponents to eugenics throughout the decades in question. In Chapter 4, Lombardo recounts the doctors, geneticists, committees, and lawmakers whose outspoken and robust opposition to eugenics yielded successful campaigns against sterilization laws. For example, critics of Harry Laughlin decried his research with the Eugenics Records Office as anecdotal at best.⁵² The lack of concrete data on the “therapeutic benefit” to those targeted by sterilization

“U.S. military doctors grossly violated medical ethics by participating in acts in violation of international treaties on human rights.” She cites Robert Jay Lifton, a Harvard Medical School psychiatrist and author of a book on Nazi doctors, who described the prison as a situation in which “doctors and other medical personnel were part of a command structure that permitted, encouraged, and sometimes orchestrated torture to a degree that it became the norm—with which they were expected to comply.”).

49. See, e.g., Lombardo, *supra* note 1, at 20 (discussing Nazi medical experiments); *Id.* at 239–40 (discussing medical experiments in U.S. institutions and asylums).

50. Brietta R. Clark, The Immigrant Health Care Narrative and What it Tells Us About the U.S. Healthcare System, 17 *Annals Health L.* 229, 237 (2008) (providing the example that in 2005, President Bush proposed a policy that would have required hospital personnel to check the immigration status of patients and report to the federal government (citing Robert Pear, Payments to Help Hospitals Care for Illegal Immigrants, *N.Y. Times*, May 10, 2005.)).

51. Paul Starr, Essay, The Meaning of Privatization, 6 *Yale L. & Pol’y Rev.* 6, 6–41 (1988), and the sources for his footnotes 27–36, provide a rich overview to this topic.

52. Lombardo, *supra* note 1, at 53–54.

laws was a major stumbling block for eugenics advocates.⁵³ Where successful, campaigns against eugenics laws in various states blocked proposed legislation by showing sterilization was being employed as unconstitutional punishment, rather than as therapy for a patient's benefit.⁵⁴ Controversy over sterilization prompted the American Institute of Criminal Law and Criminology (AICLC) to form a committee to analyze proposed laws for sterilizing criminals.⁵⁵ The committee's 1916 report was harshly critical of the anecdotal research relied upon by the eugenics movement.⁵⁶ Laughlin, however, remained undeterred by the growing number of eugenics detractors.⁵⁷

The success Harry Laughlin and others achieved in Virginia provides a classic example of how a small number of deeply committed individuals can shift public policy to their desired end, provided the opposition is generalized and sufficiently diffuse that it can be outlasted or worn down.⁵⁸ By the time Virginia passed its law, at least eleven other states had considered and rejected or repealed similar laws.⁵⁹ Of course, it is also possible that the relative success of pro-eugenic forces is attributable to issues of gender, race, class, and disability. Opponents of sterilization laws might have been less likely to protest given the identity of those targeted by the laws—poor residents of state facilities for the mentally disabled.

F. Theme Six: Comparative Law, Population Policies, and Eugenics

Chapters 15 and 17 of Lombardo's book establish the ties between U.S. proponents of eugenics policies and their German counterparts. The first of these chapters describes the evolution of eugenics in Germany as a public health measure.⁶⁰ It also illustrates the manner in which intellectual collaboration led to surprisingly similar policy formulation in the early decades of the 20th century in both the U.S. and Germany.⁶¹ In Chapter 17, Lombardo discusses the demise of the popular embrace of eugenics occasioned by the Nuremberg trials and the exposure of broad-scaled sterilization campaigns carried out by the Nazis against Jews and other sub-populations they deemed

53. *Id.* at 54.

54. *Id.* at 54–55.

55. *Id.* at 54.

56. *Id.* at 55.

57. *Id.* at 56.

58. *Supra* Theme One: The History of Eugenics, and accompanying footnotes.

59. See Lombardo, *supra* note 1, at 91.

60. *Id.* at 199.

61. *Id.*

“defective.”⁶² Interestingly, Nazi defense lawyers invoked the precedent of *Buck v. Bell* and legalized sterilization as an example of “race protection laws of other countries.”⁶³

The exposure and public condemnation of Nazi sterilization practices did not lead the U.S. Supreme Court, or state courts or legislatures for that matter, to reconsider their stance in favor of sterilization of the “feeble-minded.”⁶⁴ Instead, the surgeries continued, but at a slower pace, and according to Lombardo, public consciousness and concern over the composition of the U.S. population moved from sterilization to policies governing out-of-wedlock births and mixed-race marriages.⁶⁵

Lombardo moves on to tell the story of *Buck v. Bell*’s rediscovery in the late 1970s and early 1980s, and of the effort made by ACLU lawyers to obtain legal redress for those who had been victims of non-consensual sterilization.⁶⁶ This story provides a necessary denouement for the central topic of his book—the story of Carrie Buck and the law. It is by no means the end of the story of government efforts to regulate the reproduction of its citizenry. Instead, it serves as an excellent jumping off point for those interested in exploring both past and present population policies around the world.

In my Spring 2009 seminar, entitled “Government Regulation of Reproduction,” we used Lombardo’s chapters on German policy to launch a discussion of the perceived “population explosion” that motivated policies such as India’s “Sterilization Emergency” in the late 1970s, and that continues to animate China’s one-child policy.⁶⁷ We discussed the extent to which U.S.

62. *Id.* at 236ff.

63. *Id.* at 239.

64. *Id.* at 241.

65. *Id.* at 244–45.

66. *Id.* at 250–51 (discussing *Poe v. Lynchburg Training School and Hospital*, 518 F. Supp. 789 (1981)).

67. One of the best overviews of this subject is Amartya Sen’s essay, *Fertility and Coercion*, 63 U. Chi. L. Rev. 1035 (1996); for a brief overview of the China policy, I assigned Matthew D. Martin III, *The Dysfunctional Progeny Of Eugenics: Autonomy Gone Awol*, 15 Cardozo J. Int’l & Comp. L. 371 (2007). One might also use Nicole Skalla, *China’s One-Child Policy: Illegal Children and the Family Planning Law*, 30 Brook. J. Int’l L. 329 (2004). Regarding the Indian Sterilization Emergency, see Geetanjali Misra, Veronica Magar & Susan Legro, *Poor Reproductive Health and Environmental Degradation: Outcomes of Women’s Low Status in India*, 6 Colo. J. Int’l Envtl. L. & Pol’y 273, 285–86 (1995) (citations omitted):

In the 1970s, the government of India established mass sterilization camps. They still exist today, with some of the same abuses and poor conditions: health conditions are substandard, financial incentives are offered to both sterilization recruiters and clients, and most villages are obligated to fill sterilization quotas. Seventy percent of all couples using modern birth control methods rely on sterilization, with the woman usually being the one who is sterilized. Because vasectomies were the focus of the greatest coercion in the 1970s, vasectomy rates have dropped. Women now bear the responsibility of the sterilizations in India, even though the risks are greater for women than men.

foreign aid fuels population policies around the world, including those in Africa, which remains the continent with the world's highest birth rates. In addition, we explored endeavors to promote population growth by nations worried about declining birth rates and the aging of their population. By situating our discussion in contemporary cultures facing real problems with poverty, women's rights, access to care, and inequality, the world of Carrie Buck suddenly seemed a good deal more familiar and less readily dismissed as "ancient history" than it had earlier in the term.

II. Gender, Race, Class, Crime, and Fertility Regulation

A second set of themes emerging from Lombardo's chronicle of *Buck v. Bell* and eugenics in the U.S. involves the gender, race, and class of those targeted by the sterilization laws. Lombardo's research points to the disproportionate impact these laws had on those whose social standing rendered them vulnerable. Typically, they were women, almost always poor women, and quite often also women of color. Indeed, it is difficult to separate out the strands of gender, class, race, and crime when considering both the history and contemporary government efforts to shape reproductive patterns. In this section, I briefly discuss each of these factors, noting the ways in which membership in each group, let alone in more than one of these groups, rendered one vulnerable. Following this, I discuss the manner in which the social vulnerability of those targeted by sterilization laws permitted the laws to expand beyond their original moorings in eugenics to embrace a more frankly punitive policy.

A. Theme Seven: Gender and Sterilization Laws

From the perspective of gender, Lombardo's rendition of Carrie Buck's story serves as a particularly vivid reminder of the manner in which doctors and governments have appropriated women's bodies, and in particular their reproductive capacity, in pursuit of purportedly salutary ends. The history of the medical profession's disregard of women's bodily autonomy stretches back hundreds of years, and persists in a variety of guises even today.⁶⁸ A brief list of examples might include the remarkable history of non-consensual medical experimentation on pregnant women,⁶⁹ the efforts of psychiatrists to

68. See Cheryl Meyer, *The Wandering Uterus: Politics and the Reproductive Rights of Women* (NYU Press 1997), and Barbara Ehrenreich & Deirdre English, *For Her Own Good: Two Centuries of the Experts' Advice to Women* (Anchor 2005), for two particularly well-researched and well-written histories of the medical profession's treatment of women's bodies. More contemporary instances include court-ordered cesarean sections, in which the doctor appoints himself an agent for the fetus, and uses the court's power to override his pregnant patient's autonomy and privacy. See Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Role in Maternal-Fetal Conflicts*, 94 Nw. U. L. Rev. 451 (2000), for a discussion of the betrayal of fiduciary duty inherent in these cases.

69. See, e.g., *Mink v. University of Chicago*, 460 F. Supp 713 (1978), a class action lawsuit brought by more than 1,000 women who received diethylstilbestrol (DES) in the 1950s as part of their prenatal care at the University of Chicago's teaching hospital. Doctors gave the women DES as part of a clinical trial sponsored by the manufacturer to determine whether DES prevented miscarriages. Until almost two decades later, the women did not know that they

label as mentally ill women who sought to pursue occupations other than as housewives and mothers,⁷⁰ and more recent policies focused on the detection and punishment of women who ingest illicit substances during pregnancy.⁷¹

Lombardo's book enables the reader to situate Carrie Buck's sterilization and the eugenics movement of the early 20th century in the broad context of this history. It was no accident that Carrie, a young woman, was chosen as the test case for upholding the Virginia law.⁷² Indeed, it was her gender that brought her to the state institution in the first place. Prior to her institutionalization in Virginia's Colony for Epileptics and the Feeble-minded, she had lived with a foster family. She was placed in foster care when she was approximately three years old, after her father died and her mother was deemed incapable of caring for herself and her children.⁷³ As a child, Carrie attended school and seems to have participated fully and normally in her foster family's household.

Things changed when Carrie became pregnant after a sexual encounter with her foster parents' nephew.⁷⁴ Although she described this encounter as non-consensual—a rape—no report was filed with the police. When her foster parents realized what had happened, they brought her to the state institution for the feeble-minded.⁷⁵ Her status as an unmarried pregnant teenager, coupled with their testimony about her behavior, was sufficient evidence to have her admitted. Their nephew's reputation was protected. The harm done to Carrie had been multiplied, but her degradation was not yet complete.

Once she became a resident of the state facility, without a family who might protest on her behalf and newly delivered of her child, Carrie was identified as an ideal candidate for the first sterilization under Virginia's new law. Supporters of the law knew it would be challenged, and they consciously selected the first sterilization case with an eye to that challenge. There was little chance that, in removing Carrie's capacity for reproduction, the state might trigger

had received DES or that they were part of a clinical trial. See Lars Noah, Informed Consent and the Elusive Dichotomy Between Standard and Experimental Therapy, 28 Am. J.L. & Med. 361, 372–73 (2002), for a thoughtful discussion of this case and others like it.

70. See Charlotte Perkins Gilman, *The Yellow Wallpaper* (Dover Publications 1997) (originally published in 1892), for a vivid depiction of these policies in practice.

71. Although no one advocates taking drugs during pregnancy, current medical and legal literature on the subject exposes as irrational and counterproductive efforts to single out pregnant women for punishment. See, e.g., Lynn M. Paltrow, Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs, 8 DePaul J. Health Care L. 461 (2005); see also Nancy D. Campbell, Women as Perpetrators of Crime: The Construction of Pregnant Drug-Using Women as Criminal Perpetrators, 33 Fordham Urb. L.J. 463 (2006).

72. See Lombardo, *supra* note 1, at 63 (describing the overwhelming extent to which the first "patients" selected for sterilization from the population of state residential facilities were women).

73. *Id.* at 103.

74. *Id.* at 140 (discussing Carrie's description of her rape by her foster parents' nephew, followed by his promise to marry her).

75. *Id.* at 103.

the empathy of male judges, lawyers, doctors, policy-makers, or journalists. It would have taken too great a leap of imagination for those empowered to determine her fate to see themselves as potential victims of the same policies.⁷⁶

B. Theme Eight: Class and Eugenics

Of equal importance in rendering Carrie Buck the ideal test case for Virginia's sterilization law was the fact that she was poor, and cut off from the resources that might have enabled her to challenge the state's actions against her. As with gender, there is a long history of government-sponsored efforts to control the reproductive lives of the poor. Those in power tend to perceive a threat in the capacity of the poor to grow and multiply. Indeed, the Old Testament's account of Pharaoh's order to kill the newborn sons of Hebrew slaves reflects these fears and might be seen as an early eugenics policy of sorts.⁷⁷

In the U.S., anxiety on the part of both the government and private social service organizations served to fuel eugenics-based policies designed to curb the number of children born to poor mothers. Some of these efforts were direct, such as sterilization laws that targeted residents of public institutions. More often, though, efforts to limit reproduction among the poor were indirect. For instance, consider the rhetoric employed by Margaret Sanger, the founder of Planned Parenthood and a tireless campaigner on behalf of legalizing birth control. Although ultimately it seems she was motivated by the desire to improve the health of poor women, she often predicated her support for

76. This point is driven home forcefully by Lombardo's revelation that Dr. Arthur Estabrook, the expert whose testimony regarding Carrie Buck's "moral degeneracy" justified the state's decision to sterilize her, had a history of extramarital affairs and financial fraud—conduct easily exceeding any "moral degeneracy" manifested by Carrie Buck. *Id.* at 182–84. Even more ironic and to the point is the fact that Harry Laughlin developed epilepsy, a condition that would have made him a target for sterilization under the very law he worked to pass. *Id.* at 213–14.

77. The Old Testament Book of Exodus, Chapter 1, verses 8–16, tells the following story:
Now there arose a new king over Egypt, who knew not Joseph. And he said unto his people: "Behold, the people of the children of Israel are too many and too mighty for us; come, let us deal wisely with them, lest they multiply, and it come to pass, that, when there befalleth us any war, they also join themselves unto our enemies, and fight against us, and get them up out of the land." Therefore they did set over them taskmasters to afflict them with their burdens. And they built for Pharaoh store-cities, Pithom and Raamses. But the more they afflicted them, the more they multiplied and the more they spread abroad....And the king of Egypt spoke to the Hebrew midwives, of whom the name of the one was Shiphrah, and the name of the other Puah; and he said: "When ye do the office of a midwife to the Hebrew women, ye shall look upon the birthstool: if it be a son, then ye shall kill him; but if it be a daughter, then she shall live."

Exodus Chapter 1, <http://www.mechon-mamre.org/e/et/eto201.htm> (last visited 2/25/2009).

legalizing contraception upon her fears of the consequences of “unchecked breeding” among poor immigrants to the U.S.⁷⁸ For instance, one of her early pamphlets read:

It is a vicious cycle; ignorance breeds poverty and poverty breeds ignorance. There is only one cure for both, and that is to stop breeding these things. Stop bringing to birth children whose inheritance cannot be one of health or intelligence. Stop bringing into the world children whose parents cannot provide for them.⁷⁹

A less direct application of eugenics-based thinking to the poor may be observed in contemporary policies such as those governing health care finance for recipients of public assistance. Consider, for example, the implications of Medicaid support for sterilization, but not for other forms of reproductive healthcare, such as treating infertility. The latter is a significant problem among poor Americans of color, who suffer disproportionately from infertility secondary to sexually transmitted diseases.⁸⁰ According to the Centers for Disease Control and Prevention:

While representing 12 percent of the U.S. population, blacks had about 70 percent of reported gonorrhea cases and almost half of all chlamydia and syphilis cases (48 percent and 46 percent, respectively) in 2007. STDs take an especially heavy toll on black women, 15 to 19 years of age, who account for the highest rates of both chlamydia (9,646.7 per 100,000 population) and gonorrhea (2,955.7 per 100,000 population) of any group. STDs in this age group are of particular concern because of the potential threat of these two diseases to a woman’s fertility.⁸¹

Although Medicaid programs cover treatment for sexually transmitted diseases, the Centers for Disease Control notes that outreach programs focusing on education, prevention and early detection are necessary to combat the spread of these diseases.⁸² The appalling racial disparities in STD rates, and

78. In a 1932 article Sanger advocated: “A stern and rigid policy of sterilization and segregation to that grade of population whose progeny is already tainted or whose inheritance is such that objectionable traits may be transmitted to offspring.” Margaret Sanger, *A Plan for Peace*, *Birth Control Review*, Apr. 1932, at 106.

79. Margaret Sanger, *What Every Boy and Girl Should Know* 140 (United Sales Co. 1915).

80. Although there is not yet a consensus on why poor American youth of color suffer disproportionately high rates of sexually transmitted diseases, the link between diseases such as chlamydia and subsequent infertility is undisputed. *See* Centers for Disease Control and Prevention, Jan. 2009, <http://cme.medscape.com/viewarticle/586754> (last visited Mar. 4, 2009).

81. <http://www.cdc.gov/nchhstp/newsroom/PressRelease011309.html> (last visited Nov. 6, 2009).

82. *Id.* (quoting John M. Douglas, Jr., M.D., director of CDC’s Division of STD Prevention, “We must intensify efforts to reach these communities with needed screening and treatment services. Testing and the knowledge of infection is a critical first step toward reducing the continued consequences of these diseases.”).

the heightened risk of infertility inherent in these numbers, suggest an urgent need for policy interventions in order to protect poor women of color from infertility. Indeed, were the government truly concerned about the implications of these disparities, one would expect it to promote access to all manner of treatments associated with preserving and promoting this population's ability to bear children. Nonetheless, suggestions that government-sponsored health care plans for the poor should include treatment for infertility have been greeted by derision even from well-known liberal legislators such as the late Senator Edward Kennedy.⁸³ Given the acknowledged barriers to health care experienced by poor Americans, in conjunction with the refusal to consider funding infertility treatments, one might wonder whether there is an implicit eugenic policy in the failure to devise health care interventions to encourage the early detection and treatment of sexually transmitted diseases.

C. Theme Nine: Race and Eugenics

Although Carrie Buck was a poor white woman, the eugenics movement that ensnared her was, in reality, disproportionately concerned with regulating the reproductive lives of women of color. Because the bulk of his book is devoted to telling Carrie's story, Lombardo only occasionally notes the deep racism that infected, and many argue continues to affect, government reproduction-related policies.⁸⁴ This is not to say that Lombardo views the racist implications of eugenics policy as a thing exclusively of the past. Indeed, toward the end of the book, Lombardo provides a telling reminder that "the class-based, racist eugenics of previous generations is not dead."⁸⁵ Lombardo recounts the 2004 congressional election in Tennessee, in which James Hart ran on a eugenic platform, advocating for a "war on poverty genes," namely those of the "African race."⁸⁶

83. For example, when Massachusetts paid for fertility drugs given to Medicaid patients on welfare, many of whom already had children, Senator Kennedy responded with "Our goal in using tax dollars wisely is to reduce welfare dependency, not create more of it." Ellen Goodman, *A Short Supply of Common Sense in Government-Funded Conception*, *The Boston Globe*, March 20, 1994.

84. Lombardo discusses some proposals for race-based eugenics laws, as well as the discriminatory implementation of past sterilization laws. *See, e.g.*, Lombardo, *supra* note 1, at 27 (citing a California physician whose solution to the "Negro problem" was to enact a eugenics law similar to a 1911 New Jersey sterilization law); *id.* at 58 (discussing race as an issue during eugenics law proposals in 1907 Virginia, where one doctor called for the castration of black men who assaulted white women); *id.* at 158 (noting that former President William Howard Taft, Chief Justice of the Supreme Court during *Buck v. Bell*, rejected the "unsanity of racial prejudice" that characterized eugenics laws mandating racial separation); *id.* at 243 (including a section on *Loving v. Virginia* and how eugenics motives underscored anti-miscegenation laws); and *id.* at 248 (regarding the massive rates of sterilization performed on Native Americans at Indian Health Services facilities).

85. Lombardo, *supra* note 1, at 275.

86. *Id.*

In considering how to explore the racist legacy and ongoing relevance of eugenics in contemporary policies, one might well turn to the history of U.S. immigration policy.⁸⁷ This history is rich material for those either curious about, or perhaps ignorant of the manner in which the U.S. government has attempted and still attempts to shape the composition of its population. Because I covered much of this material in considering contemporary comparative population policies,⁸⁸ when teaching my seminar, I elected to engage in a more straightforward examination of the ways in which race intersects with eugenics policies, beginning in the early 20th century.

Dorothy Roberts' 1997 book, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty*, is one of the richest explorations of the long history of eugenic and quasi-eugenic policies that have regulated the lives of poor black women in the U.S.⁸⁹ In her book, Roberts traces social policies governing the reproductive lives of black women to the era of slavery. It is almost too painful to consider the human torment inherent in policies that treated female slaves as breeders, sanctioning the forcible removal and sale of their offspring, whether conceived in rape, in forced breeding, or perhaps in love. But those who wish to understand the hubris of American eugenics cannot afford to ignore this history, as it is the unvarnished prologue to much of what has followed.

Slavery "marked [b]lack women from the beginning as objects whose decisions about reproduction should be subject to social regulation rather than to their own will."⁹⁰ Roberts argues that one might see later policies, such as those advanced by the birth control and eugenic movements of the early 1900s, as direct descendents of slavery's attitude toward black women.⁹¹ Several other scholars advance similar arguments with regard to contemporary policies governing reproduction, particularly those governing perinatal substance abuse and access to assisted reproductive technology.⁹²

Native American women likewise fell victim to government policies that devalued their reproductive autonomy and their offspring. Many accounts document the genocidal policies of European settlers in North America. From

87. See, e.g., Charles Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. Rev. 755 (2000).

88. See *supra* note 67 and accompanying text.

89. Dorothy Roberts, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* (Vintage 1997).

90. *Id.* at 23.

91. Roberts is cautious in tying early birth control reformers to the strictly racist policies of early eugenicists. For example, although Roberts criticized Margaret Sanger, the strongest feminist advocate for birth control in the early part of the 20th century, for her eventual alliance with certain eugenic interests, she ultimately dismisses the charge that Sanger was a racist: "It appears that Sanger was motivated by a genuine concern to improve the health of the poor mothers she served rather than a desire to eliminate their stock." *Id.* at 81.

92. See Michele Goodwin, *Issues of Access to Advanced Reproductive Technologies: Prosecuting the Womb*, 76 Geo. Wash. L. Rev. 1657 (2008), for a particularly thought-provoking and thorough discussion of the persistence of eugenic policies.

the time of their earliest contact, Native Americans were relentlessly pursued and many individuals murdered; entire tribes were forcibly relocated from their homes and their land was stolen.⁹³ For many years, the federal Bureau of Indian Affairs (BIA) operated health clinics in which Native American women were subjected to forced sterilization.⁹⁴ Accounts of these forced sterilizations indicate that the women who did consent often did so under duress: they were provided inaccurate medical information and even threatened with the loss of health services or welfare benefits.⁹⁵ Nor were these policies ancient history. Medical records show that as recently as the 1970s, the BIA-operated Indian Health Service Hospital in Claremore, Oklahoma was routinely performing sterilization procedures on Native American women without obtaining a thorough informed consent.⁹⁶

Once one situates governmental reproduction-related policies and race in historical context, the through-line linking these policies to contemporary efforts to regulate the reproductive lives of women of color is readily apparent. For instance, consider the manner in which the criminal justice system has responded to public health problems stemming from perinatal substance abuse. Long after being discredited on medical and public health grounds, criminal justice officials have persisted in prosecuting “pregnant addicts,” focusing on public hospitals used disproportionately by poor women of color who use street drugs.⁹⁷ The effort to cast substance abuse by pregnant women as a crime flies in the face of virtually all contemporary literature by medical and public health experts, who note, first, that the focus on drugs misses the equally, if not more menacing, harm posed to fetuses by alcohol and/or prescription drug abuse, and, further, that the threat of prosecution drives women away from the health care system, rather than encouraging them to see it as a resource for securing healthier outcomes for themselves and for their

93. Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 *Ariz. J. Int'l & Comp. L.* 1017, 1046 (2001).

94. *Id.* at 1046 n.208 (citing Nancy Ehrenreich, *The Colonization of the Womb*, 43 *Duke L.J.* 492, 515, n.73 (1993) (noting that 24 percent of all Indian women of childbearing age had been sterilized by 1976, and Indian Health Services routinely sterilized up to 3,000 Native American women per year)).

95. *Id.* at 1048-49.

96. *Id.* at 1049. Note that the sterilization policies were only part of a more extensive eugenic program in North America. For over a hundred years, the United States and Canadian governments forcibly abducted Native American children as young as five from their homes and took them to government-sponsored “Indian schools” where they were “educated” and “assimilated” into the dominant culture. *Id.* at 1049-50. See also Keri B. Lazarus, *Adoption of Native American and First Nations Children: Are the United States and Canada Recognizing the Best Interests of the Children?*, 14 *Ariz. J. Int'l & Comp. L.* 255, 257 (1997).

97. See Paltrow, *supra* note 71, for a discussion of states’ ongoing punitive responses to the use of drugs and alcohol by pregnant women.

fetuses.⁹⁸ Criminalization of perinatal substance abuse, according to Professor Roberts, must be seen as part of a “continuing legacy of the degradation of [b]lack motherhood.”⁹⁹

Professor Roberts argues that anxiety about black mothers and their babies has motivated contemporary policies as diverse as welfare regulations, the criminalization of substance abuse by pregnant women, and mandatory sterilization. These policies, Roberts explains, ultimately rest upon and reinforce “the twin assumptions that the problem of [b]lack poverty can be cured by lowering [b]lack birthrates and that [b]lack women’s bodies are an appropriate site for this social experiment.”¹⁰⁰ As Roberts explains, prosecution and criminalization are part of a larger and long-term social tendency to devalue black mothering. This tendency draws upon and reinforces dominant ideals of motherhood, which include ideas about who is and who is not fit to be a mother, and about whose offspring are a social benefit and whose are not. As we have seen throughout history, such ideals may explicitly or tacitly inform a host of eugenic policies.

D. Theme Ten: Crime, Reproduction, and Expanding Eugenics to Criminals

As is true with many other things, a little bit of scientific knowledge can cause a great deal of harm. This truism was borne out as proponents of sterilization for the “mentally deficient” began to advocate for a more broadly scaled use of sterilization on behalf of improving the human race. In the spirit of quasi-science that already infused eugenics policies, the years following passage of the Virginia sterilization statute saw a demand for sterilization that went well

98. Numerous publications have demonstrated that crack addiction, which triggered the initial wave of prosecutions of pregnant women, is and remains today both less prevalent and more racially diverse than portrayed by the media. *See, e.g.*, Laura E. Gomez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* (Temple University Press 1997). Moreover, media reports and policy makers alike ignored the many other causes of fetal harm, which include alcohol, tobacco, poverty, poor health, domestic violence, and poor nutrition. In view of these factors, crack cocaine usage certainly is not the only substance, nor even the primary substance, that poses a threat to fetal wellbeing. As Roberts suggests in *Killing the Black Body*, drug addiction often occurs in such a complex context that it is exceedingly difficult to determine what precisely impairs a fetus: “Researchers cannot tell us which of this array of hazards actually caused the terrible outcomes they originally attributed to crack.” Roberts, *supra* note 89, at 158.
99. Roberts, *supra* note 89, at 153–54 (noting that in Charleston, South Carolina alone, “all but one of four dozen women arrested for prenatal crimes in Charleston were [b]lack”). At the national level, 70 percent of the 1990 criminal cases involving prenatal drug exposure also involved black defendants. *Id.* at 172. And despite a slightly higher rate of drug use rate among white women, black women are ten times more likely to be reported to authorities. These statistics can be explained in part by the racial bias of medical professionals. Roberts quotes one nurse as saying that her solution to the problem of prenatal drug exposure would be to recommend that “most [b]lack women...have their tubes tied....” *Id.* at 175.
100. *Id.* at 149.

beyond any plausible foundation in genetic inheritance. The most noteworthy of these policies were laws that permitted states to order sterilization for “habitual criminals,” whom it deemed to be “morally deficient.”¹⁰¹

Lombardo’s chapter on *Skinner v. Oklahoma* traces the expansion of sterilization laws to include those whose repeated encounters with the criminal justice system rendered them eligible for state-ordered sterilization. After *Buck* was decided, six states relied on the opinion to support their own sterilization laws.¹⁰² One of these states was Oklahoma, where the release of certain institutionalized persons was conditioned upon sterilization.¹⁰³ Later, Oklahoma extended the law to prisoners, mandating involuntary sexual sterilization for repeat offenders.¹⁰⁴ Oklahoma’s law singled out “habitual criminals,” defined as “three-time felons.”¹⁰⁵ The class-based eugenic foundation for these laws is revealed when one considers the manner in which substantially similar felons, such as those convicted of larceny or embezzlement, subject to the same prison term under Oklahoma law, were not subject to involuntary sterilization.¹⁰⁶ Some have suggested that the only plausible distinction between these categories of offenses is that the typical theft convict is more likely to be relatively poor, whereas those convicted of larceny or embezzlement tend to be white collar.¹⁰⁷

Mr. Skinner’s first conviction was in 1926, following his arrest for stealing chicken.¹⁰⁸ Over the next 10 years, he committed two additional crimes, both armed robberies.¹⁰⁹ On the strength of this criminal record, the Oklahoma attorney general moved to have him declared a habitual criminal, and ultimately, the state Supreme Court ordered him sterilized.¹¹⁰ The U.S. Supreme Court took *certiorari* on the case and reversed, arguing principally that the Oklahoma act was flawed because Skinner had not been afforded the chance to advance evidence showing that he was not likely to become the “probable potential parent of socially undesirable offspring.”¹¹¹

101. Lombardo, *supra* note 1, at 219.

102. *Id.*

103. *Id.* See Victoria F. Nourse, In Reckless Hands: *Skinner v. Oklahoma* and the Near-Triumph of American Eugenics (WW. Norton & Co. 2008), for a refreshingly thorough and readable history of the *Skinner* case and its legacy.

104. Lombardo, *supra* note 1, at 221.

105. *Id.*

106. *Id.* at 223–24.

107. See, e.g., Steven M. Recht, Note, “M” is for Money: Baby M and the Surrogate Motherhood Controversy, 37 Am. U. L. Rev. 1013, n.108 (1988).

108. Lombardo, *supra* note 1, at 225.

109. *Id.*

110. *Id.*

111. *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942).

Finding flaws in the *Skinner* decision is almost as easy as finding flaws in *Buck v. Bell*. (Was *Skinner* really a “habitual criminal”? If so, was there any reason to believe his criminal behavior derived from his genetic makeup, and was capable of being transmitted to his offspring?). But despite its acknowledgement of the statute’s seemingly weak factual foundation, the Court took issue only with the due process violations imposed on *Skinner*. The holding itself is ambiguous in that it is not clear whether the Court believed *Skinner* should have been permitted to advance evidence showing he actually had the potential to produce socially desirable offspring (and who knows what that means or how one would prove it), or whether instead the court meant only that *Skinner* should have been permitted to argue that he did not intend to become a parent. Other parts of the law (for example, the seemingly arbitrary list of crimes that trigger sterilization), would have been permitted to stand. In dicta, for instance, the Court noted that it would not have second-guessed the state’s use of its police power to single out the thief while protecting the embezzler.¹¹²

More interesting, though, is the morphing of eugenics from its original anchor in a mistaken understanding of genetic inheritance to a policy of state-based reproductive control unrelated to genetics. Although it struck the underlying law, the Supreme Court’s opinion in *Skinner* foreshadowed a host of later criminal justice policies devaluing the reproductive capacity of felons. Consider, for example, the numerous cases conditioning probation or lenient sentencing upon the convict’s consent to use contraception or to be sterilized.¹¹³ Sometimes judges suggest sterilization or contraception as a condition of probation for those convicted of crimes involving harming their own children. Although controversial because such conditions surely are not the least restrictive means of protecting an as-yet-to-be conceived child, one

112. The Court in *Skinner* noted that Oklahoma’s Habitual Criminal Sterilization Act allowed for sterilization of a criminal for larceny but not for embezzlement, though the crimes are almost identical under Oklahoma law and only differentiated for sterilization purposes. *Id.* at 542–43. The Court went on to say, “...if we had here only a question as to a State’s classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised.” *Id.* at 540. The classist bias built into this law is explicit: common thieves, who are more likely to be poor than embezzlers, should not be permitted to propagate.

113. See, e.g., *Broadman v. Comm’n on Judicial Performance*, 959 P.2d 715, 725–26 (Cal. 1998) (describing the facts of the unpublished case, *People v. Johnson*, in which the judge ordered that the defendant submit to a Norplant birth-control implant as a condition of probation citing *People v. Johnson*, No. F015316, 1992 WL 685375 (Cal. Ct. App. 1992)). See generally Janet F. Ginzberg, Note, Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant, 58 Brook. L. Rev. 979 (1992), for a discussion of cases in which women defendants were ordered to avoid pregnancy, either via mandated birth control or behavior control, as part of the term of their probations. For an example of sterilization in lieu of prison time, see Rachel Roth, “No New Babies?": Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems, 12 Am. U. J. Gender Soc. Pol’y & L. 391, 407 (2004) (discussing Melody Baldwin, who in 1988 pleaded guilty to child neglect after facing a murder charge in the death of her four-year-old son. She was pregnant when she appeared before the judge. She complied with his “suggestion” to undergo sterilization after giving birth, and the judge sentenced her to ten years out of a possible twenty in prison).

can at least follow the line of reasoning that leads the judge to propose such a condition.¹¹⁴ Other times, however, the court's effort to curb reproduction among those whom they convict is utterly disconnected from the crime for which they have been convicted. For example, Lombardo includes the example of judges who offer men who have fallen seriously behind on child support payments the option of going to jail or having a vasectomy.¹¹⁵

III. The Regulation of Reproduction, or Eugenics in the 21st Century¹¹⁶

As discussed throughout this essay, governmental regulation of reproduction can be accomplished directly or indirectly, via economic policies as well as by civil regulation and criminal laws. In this final section, I consider three manifestations of contemporary "eugenic" policies not necessarily touched upon in Lombardo's history, but plainly growing out of the rich foundation his work has laid: the contemporary market in human gametes, the development and incorporation of prenatal testing into standard prenatal care, and the regulation of sex and reproduction among developmentally disabled individuals.

114. Rory Riley, Note: A Punishment that Does Not Fit the Crime: The Use of Judge-Ordered Sterilization as a Condition of Probation, 20 *Quin Prob. L. J.* 72 (2006).
115. See e.g. *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001). See also Lombardo, *supra* note 1, at 276; see *Skinner*, 316 U.S. 535 (noting that *Skinner* was to be sterilized for theft); see also Angela Hooton, Symposium, Celebrating Twenty Years of Feminist Pedagogy, Praxis, and Prisms: A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism, 13 *Am. U. J. Gender Soc. Pol'y & L.* 59, 71 (2005) ("In California, some judges ordered female defendants to undergo sterilization as a condition of probation. In one particularly notorious case, a twenty-one year old Latina was given the choice between jail time or probation conditional upon her sterilization. The crime, a misdemeanor, was being present in a room where her boyfriend was caught smoking marijuana. In addition to probation sentences, some women were coercively sterilized in order to obtain welfare benefits.").
116. In recent decades, the word "eugenics" has come to have specific resonance with anti-abortion advocates. There is much to be said about the extent to which such an analogy is apt or inapt. In a newer essay, Lombardo probes this question. See Paul A. Lombardo, Disability, Eugenics, and the Culture Wars, 2 *St. Louis U. J. Health L. & Pol'y* 57 (2008).

*A. Theme Eleven: Eugenics and the Market in Human Gametes*¹¹⁷

The infertility industry has given rise to a thriving international market in the sale of gametes—human eggs and sperm. This market proliferates, to a great extent heedless of state and national efforts at regulation and standardization, owing largely to deep-seated beliefs regarding the significance of genetic endowment.¹¹⁸

The first artificial insemination dates back to 1790 in Scotland; the first reported artificial insemination in the U.S. occurred in 1884.¹¹⁹ American doctors began using artificial insemination with donor sperm in the 1950s to help married couples in which the husband's sperm count was too low to permit conception.¹²⁰ Originally, the focus on genetics tended to be limited to a concern with matching the donor's physical characteristics to those of the infertile husband—height, hair color, eye color, and ethnicity.¹²¹

At first blush, the desire to produce a child who will resemble his non-biological parent seems uncontroversial and almost innate. Parents often look for signs of themselves in their children; indeed some sociobiologists contend

117. One might easily expand this topic to include a discussion of the class-based, de-facto eugenics inherent in permitting free-market approaches to govern access and regulation of assisted reproductive technologies (ARTs). At first blush, it seems that the challenge of paying for various forms of ARTs is no different from other market challenges facing those with limited resources. The eugenic side of this issue emerges when one considers the disparate impact of governmental non-regulation on two populations: gays and lesbians, and the poor. By definition, gays and lesbians need some intervention in order to have children. Many states do not permit same-sex couples to adopt or refuse to acknowledge adoptions permitted under the laws of other states. See Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 Am. U. L. Rev. 1 (2008), for a breakdown of which states permit same-sex adoptions and which do not, and the Full Faith and Credit issues that arise when same-sex couples with adopted children travel interstate. Gays and lesbians would seem to be particularly likely consumers of assisted reproductive technologies, and yet, discrimination by private doctors may dissuade many from obtaining the assistance they need. Although she ultimately was victorious in court, the story of Guadalupe Benitez is illustrative of this point. See *North Coast Women's Care Medical Group, Inc v. Superior Court*, 189 P.3d 959 (Cal. 2008) (upholding a lesbian patient's claim that her doctors violated state anti-discrimination laws by refusing to perform intrauterine insemination). The disparate impact of high-cost ARTs on the poor is self-evident, and yet, even their usual allies in Congress laugh at the thought that Medicaid might have an obligation to assist poor Americans in their desire to have genetically-linked offspring. See *supra* note 83 (regarding Senator Edward Kennedy's response to the proposition that Massachusetts should pay for fertility drugs given to Medicaid patients on welfare).
118. See generally Lisa Hird Chung, Note, *Free Trade in Human Reproductive Cells: A Solution to Procreative Tourism and the Unregulated Internet*, 15 Minn. J. Int'l L. 263 (2006).
119. The Assisted Reproductive Technology Timeline, available at <http://www.artparenting.org/about/index.html> (last visited Dec. 10, 2009).
120. See Ann Lamport, Note, *The Genetics of Secrecy in Adoption, Artificial Insemination, and In Vitro Fertilization*, 4 Am. J.L. & Med. 109 (1988); see also Kathleen M. Thies & John F. Travers, *Growth and Development Through the Lifespan* 37 (Jones & Bartlett Publishers 2004).
121. See Lamport, *supra* note 120, at 117.

that the impulse to reproduce derives at least in part from our yearning toward self-replication.¹²² Of course, it is impossible to guarantee whether any given sperm from a donor will in fact carry the specific traits desired by the recipient.¹²³ Nonetheless, from the start, doctors and recipient families considered it desirable and sound practice to seek out sperm donors using assumptions about genetic inheritance.

It was a small leap from the practice of choosing physically similar sperm donors to buying oocytes (human eggs) from young women with high SAT scores and specific talents, attributes, and accolades (e.g., athletic scholarships, musical talent, ethnic identity).¹²⁴ College newspapers across the U.S. routinely run advertisements from infertile couples seeking oocytes from particularly gifted female students in the hopes that their genes will optimize their chances of producing a similarly gifted child.¹²⁵ In spite of efforts by national regulatory organizations to cap payments, it is clear that the market grades oocytes according to the perceived value of the genes they bear.

122. See, e.g., Richard M. Lerner, *Concepts and Theories of Human Development* 317 (Lawrence Erlbaum Associates 2002) (stating that a purpose of human reproduction is to provide a means by which genes replicate themselves).
123. See generally Michael Malinowski, *Choosing the Genetic Makeup of Children: Our Eugenics Past—Present, and Future?*, 36 Conn. L. Rev. 125 (2003) at notes 426–431 (discussing limitations on the current technological capacity to predict outcomes in prenatal genetic diagnostic techniques, along with the eugenic potential inherent in emerging technologies).
124. See, e.g., Sherri A. Jayson, *Comment, Loving Couple Seeks Woman Age 18–31 To Help Have Baby. \$6500.00 Plus Expenses and a Gift: Should We Regulate the Use of Assisted Reproductive Technologies by Older Women?*, 11 Alb. L.J. Sci. & Tech. 287, 329 & n.293 (2001) (noting that “high demand” eggs are “typically” those from educated and tall white women. Prospective parents and clinics consider the donor’s age; medical and sexual history; language, analytical, athletic, musical, and artistic ability; S.A.T. score; level of education; profession; religion; race and ethnic origin; width and length of nose and her degree of nostril flare; skin tone and tanning ability; hair color and texture; whether she has moles, freckles and dimples; and if she wore braces as a child); see also The Center for Assisted Reproduction’s Egg Donor Information website, available at <http://www.donoregginfo.com/html/donors/process.html#evaluation> (last visited Dec. 10, 2009). The website explains the procedure for egg donation, which includes a thorough medical evaluation and the gathering of “vital statistics about each donor such as ethnicity, height, weight, and eye color, as well as some information on interests and hobbies.”
125. See, e.g., Divya Subrahmanyam, *Ivy League Egg Donor Wanted*, Yale Daily News, Apr. 23, 2008, available at <http://www.yaledailynews.com/articles/view/24634> (last visited Dec. 10, 2009).

Much has been written about the inherent race, class, and gender bias in the oocyte market.¹²⁶ Some would remedy these problems by standardizing or capping the prices women receive for their eggs; others would ban payments for human gametes altogether.¹²⁷ To date, however, little effort has been made to rein in the market in human gametes, which proliferates in spite of the absence of scientific studies establishing the likelihood or the extent to which an offspring will possess her parents' non-physical traits. Although scientists understand the manner in which genetic inheritance controls the manifestation of single-gene traits, such as eye-color, or single-gene disorders such as Down syndrome or Huntington's disease, they are far from understanding how or whether traits such as intelligence or athletic ability are linked to genetics. At best, we can hypothesize that the extent to which a particular trait or ability manifests in a child results from a combination of genetics, environment and luck.¹²⁸ Indeed, according to Dr. Dennis Garlick, who analyzed 124 studies of the underlying basis of intelligence, present scientific thinking suggests that intelligence is partially created, rather than wholly inherited.¹²⁹ Specifically, his review of available research supports a dynamic model, in which intelligence is not a static trait, inherited at conception, but rather, "...is created when neural connections in the brain are changed in response to environmental cues."¹³⁰

It is this uncertainty about whether genetics matters that raises perhaps the most interesting questions to be asked about the relationship between eugenics and assisted reproductive technologies. Consider what we do and don't know. We know, for instance, that there are some negative short-term physical consequences for women who undergo ovarian stimulation in order to become a "donor." We do not know very much about the long-term physical or psychological consequences of "donation." Although it might

126. Jayson, *supra* note 124, at 329, n.293 ("White eggs can fetch higher prices than Hispanic eggs. Because of a scarcity of donors, Jewish eggs are in high demand."); *see also* John A. Robertson, Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation, 39 Case W. Res. L. Rev. 1,31 (1989) (arguing that "[f]ears about class bias and exploitation of the poor seem insufficient to exclude this important source of donor eggs"). *See* Kimberly S. Palmer, Get Rid of Bias Against Egg Donors, USA Today, July 29, 1999, at 13A, for a discussion of gender bias in the gamete market regarding society's perception of sperm donors versus egg donors, as well as the more stringent qualifications for egg donors in comparison to sperm donors.

127. *See* Michelle Oberman, Leslie Wolf & Patti Zettler, Where Stem Cell Research Meets Abortion Politics: Limits on Buying and Selling Human Oocytes, in *Baby Markets: Money and the New Politics of Creating Families* (Michele Goodwin ed., Cambridge University Press forthcoming 2010), for an overview of the various (rapidly morphing) positions on selling oocytes.

128. Malinowski, *supra* note 123.

129. *See generally* Dennis Garlick, Understanding the Nature of the General Factor of Intelligence: The Role of Individual Differences in Neural Plasticity as an Explanatory Mechanism, 109 Psychol. Rev. 116 (2002) (presenting the author's theory of "neural plasticity" to explain conflicting studies about intelligence, in order to reconcile data suggesting intelligence, although inherited, is also improved by one's environment).

130. *Id.*

have seemed an obvious inquiry for scientists to pursue, twenty-plus years after the reproductive endocrinologists began using donor oocytes, evidence regarding long-term psychological consequences remains mostly anecdotal.¹³¹ Likewise, we know little about the consequences for children conceived in this manner. Early studies suggest higher than average rates of low birth weight, birth defects, and neurological problems.¹³² Finally, we know little about the experiences of parents whose children are conceived using donor gametes. How do they respond to the traits their child manifests? What happens when the child they hoped would be a tall, brilliant athlete turns out to be a short child of below-average abilities?

These uncertainties surely shape the calculus for an individual or a couple contemplating using assisted reproductive technologies to have a child. The extent to which the market in human gametes proliferates is testament, then, to an unspoken faith in the significance of a genetic link. I have seen evidence of this faith when I've asked students to consider which sort of infertility they think would be harder to endure, the inability to produce gametes, or the inability to carry a child to term? Invariably, the majority concludes they'd be more devastated by an inability to have a child who was "genetically their own" than they would be by the inability to become pregnant themselves.

I don't judge these students any more than I do prospective parents who choose to pursue a child with a particular genetic background, be it their own or one acquired from another. I too would have struggled had I faced similar choices. No matter how little we actually know about genetics and inheritance, no matter how ugly the history of eugenics, no matter how much we have internalized Freud and post-Freudian thinking about how parenting shapes the life experiences of offspring, I retain an abiding faith that "who" we are is at least in part a manifestation of our parents' DNA.

131. Egg donors, especially those who donate more than once, express the psychological repercussions they experience in blogs, memoirs, and interviews. Egg donor blogs include <http://eugenics.blogspot.com/> (website no longer available) and <http://eggdonor.blogspot.com/> (last visited Dec. 11, 2009). In recent years, egg donors and their recipients have written anecdotal books that touch on the psychological impact of egg donation on the donors. See, e.g., Julia Derek, *Confessions of a Serial Egg Donor* (Adrenaline Books 2004); Carol Lorbach, *Experiences of Donor Conception: Parents, Offspring, and Donors Through the Years* (Jessica Kingsley Publishers 2003). The physical repercussions of repeated egg donation are widely known; for example, repeat donors have increased risk for ovarian cancer and long term hormonal imbalance. See, e.g., Gigi Stone, *Egg Donation: Is it Worth the Big Money?*, ABCNews.com, Jan. 11, 2008, <http://abcnews.go.com/WN/story?id=4121158&page=1> (last visited Mar. 2, 2009).

132. George Kovalevsky, Paolo Rinaudo & Christos Coutifaris, *Do Assisted Reproductive Technologies Cause Adverse Fetal Outcomes?*, 79 *Fertility & Sterility* 1270 (2003), *reprinted in* Judith F. Daar, *Reproductive Technologies and the Law* 49 (Matthew Bender & Company, Inc. 2006); *see also* Alastair G. Sutcliffe & Michael Ludwig, *Outcome of Assisted Reproduction*, 370 *Lancet* 351 (2007) (reviewing the scant literature on the impact of these technologies, in spite of over thirty years experience).

B. Theme Twelve: Prenatal Testing, Disability, and Eugenics

Beginning in the 1970s and 1980s, prenatal screening and genetic testing became a standard part of prenatal care. Health care providers began offering pregnant women of “advanced maternal age” (those age thirty-five or older) a series of tests, some invasive, some simply urine screens, designed to identify genetic abnormalities in their fetuses.¹³³ Indeed, some states began to require all pregnant women be offered the least expensive of these screens—the maternal serum alpha-fetoprotein screen.¹³⁴ These tests were incorporated into standard practice without much consideration of the impact they would have on the pregnant woman, her partner, her fetus, and on the population as a whole.

The rapid incorporation of genetic testing into prenatal care seems to reflect an assumption that it would be an unqualified good to know whether one’s fetus is genetically abnormal. Indeed, many women apparently view the tests in this manner, accepting as many as are offered, and terminating their pregnancies when the tests indicate serious abnormalities.¹³⁵

At least two significant “eugenic” concerns might be raised about the pace and the manner in which genetic screens and tests have become the standard of care in treating pregnant women. First, little attention has been paid to the information given to women when they consent to be tested and when they learn the results of their tests.¹³⁶ Some studies suggest at least some women might be confused by the fact that their health care provider is offering a genetic test.¹³⁷ Nancy Press’s study of California women, for instance, surveyed pregnant women who self-identified as anti-abortion, and yet, consented to the alpha-fetal-protein test.¹³⁸ The fact that they underwent such testing was puzzling owing to their convictions against terminating pregnancy, and

133. See Sonia Mateu Suter, *The Routinization of Prenatal Testing*, 28 *Am. J.L. & Med.* 233, 234–36 (2002) (describing history of prenatal testing in the U.S.).

134. Cal. Code Regs. tit. 17, § 6527 (2002):
Clinicians shall provide or cause to be provided to all pregnant women in their care before the 140th day of gestation, or before the 126th day from conception, as estimated by medical history or clinical testing, information regarding the use and availability of prenatal screening for birth defects of the fetus. This information shall be in a format to be provided or approved by the Department [of Health] and shall be given at the first prenatal visit and discussed with each pregnant woman.

135. See Suter, *supra* note 133, at 256–260.

136. Dr. Elena Gates is one of few practitioners who has devoted significant thought to this issue. See, e.g., Elena Gates, *Communicating Risk in Prenatal Genetic Testing*, 49 *J. Midwifery Women’s Health* 220 (2004).

137. See Suter, *supra* note 133, at 256–260 (describing the connection between prenatal testing and pregnancy termination); see also T.M. Marteau, *Towards Informed Decisions about Prenatal Testing: A Review*, 15 *Prenat Diagn.* 1215 (1995).

138. Nancy Anne Press & Carole H. Browner, *Collective Silences, Collective Fictions*, in *Women and Prenatal Testing: Facing the Challenges of Genetic Technology* 201, 213 (Karen H. Rothenberg & Elizabeth J. Thomson eds., Ohio State Univ. Press 1994).

indeed, Press found that many of these women consented to the test under the mistaken impression that it was “good for their fetus,” or “recommended by their doctors.”¹³⁹

It is in thinking about what sort of information should be required for a truly informed consent that one recognizes the complexity posed by these now-routine tests. Consider, for instance, the information given to a woman about her options following a “bad” result after amniocentesis. If her test results indicate that she is carrying a fetus with trisomy 21, or Down syndrome, what sort of information does she need in order to determine whether to terminate her pregnancy? Clearly, the circumstances warrant more than merely a disclosure of the risks of terminating a pregnancy versus carrying a pregnancy to term. But who determines the quality and quantity of information disclosed about the implications of trisomy 21 for a child? Will the woman be permitted to meet parents of children with Down syndrome, or the children themselves? Would such meetings, or even the suggestion of such meetings, be considered intrusive and overly paternalistic, smacking, perhaps, of the efforts of anti-abortion forces to chill abortion by demanding ultrasounds and speeches as part of “informed consent” to the procedure? And yet, without such information, the individual decision to terminate may be based upon little more than gut level responses to the thought of having a mentally challenged child.¹⁴⁰

At a population level, the eugenic implications of population testing are more readily apparent. If large numbers of women who undergo testing opt to terminate their pregnancies, there will be fewer babies born with genetic abnormalities. Perhaps this fact will benefit society at an economic level. Indeed, one might worry that there will be discriminatory consequences for those who elect to carry to term genetically abnormal offspring. These individuals, such as those born with Down syndrome, tend to generate higher than average health care costs. But clearly the decision to diminish the genetic diversity of the human population should be predicated on more than economics. We cannot know the long-term consequences for our population of reducing its diversity in this manner, but it seems the ultimate hubris to assume that, because we cannot be sure it will be harmful, there is no reason not to proceed in altering the course of our population as a whole.

139. See Press & Browner, *supra* note 138, at 213; see also Suter, *supra* note 133, at 256–60.

140. Congress recently passed the Kennedy-Brownback law, which promises a partial solution to this problem by insuring that women are told the full range of options following prenatal testing. Prenatally and Postnatally Diagnosed Condition Awareness Act, S. 1810, 110th Cong. (2007), Pub. L. No. 110–374 (2008). The law requires families receiving a prenatal or postnatal diagnosis of Down syndrome (or other congenital condition) be offered current medical information about life-expectancy, development potential, and quality of life for a child born with the condition. The bill also provides for the establishment of a registry of parents willing to adopt children with disabilities.

Ultimately, the population-based concern collides with concerns about individual autonomy. Nonetheless, it seems clear that those on all sides of the abortion issue should agree that those who receive genetic testing should be provided with the most comprehensive informed consent process.¹⁴¹

C. Theme Thirteen: Disability, Sexuality, and Parenting

The final realm in which I will consider the troubling legacy of eugenics in contemporary culture lies in the manner in which caretakers, empowered by the law, respond to issues of sexuality and reproduction among the mentally disabled. In the Epilogue to his book, Lombardo reviews contemporary practices governing the sterilization of mentally disabled individuals. He concludes that current legal safeguards make it improbable, although not impossible, for government officials to embark upon the sort of broad-scaled sterilization campaigns seen in the early 20th century.

Lombardo observes that current sterilization laws apply to “incompetents,” such as the mentally ill or mentally retarded.¹⁴² These laws run the gamut from highly protective of an individual’s due process rights to a startling Arkansas law that requires no judicial review before sterilization.¹⁴³ Lombardo questions the state laws that allow parents or legal guardians of the mentally disabled to request “voluntary” sterilizations of their family members or wards.¹⁴⁴ He finds troubling the “extent to which this practice may reflect the same attitudes played out in the *Buck* case—that the disabled are worthy of contempt and that the social costs such people generate justify court orders for unwanted surgery.”¹⁴⁵

Although the ongoing practice of permitting the state to order the sterilization of mentally disabled individuals may be seen as a reflection of conventional eugenic notions, it also is the product of a broader set of legal, medical, ethical, and pragmatic concerns. Decisions surrounding sex, pregnancy, and parenting by mentally disabled individuals are complex, and trigger a variety of concerns on the part of their caretakers. Parents, the most common caretakers for mentally disabled adult children, may express a desire to control or limit their child’s sexual activity for reasons ranging

141. See Mary B. Mahowald, *Genes and Disability: Defining Health and the Goals of Medicine: Aren’t We All Eugenists?* Commentary on Paul Lombardo’s “Taking Eugenics Seriously,” 30 Fla. St. U. L. Rev. 219 (2003), for a thoughtful consideration of this issue. See also Note, *Regulating Eugenics*, 121 Harv. L. Rev. 1578 (2008).

142. Lombardo, *supra* note 1, at 267.

143. *Id.*

144. *Id.* at 268.

145. *Id.*

from personal discomfort with the prospect of their child becoming a sexual being,¹⁴⁶ to concerns about their child's capacity to consent to sex, to fear that their child will be unable to raise a child on their own.¹⁴⁷

There is a wide range of abilities among individuals who might be termed "mentally disabled."¹⁴⁸ In the realm of sexual contact, the relevant legal issues turn on the extent to which an individual is deemed "competent." The legal definition of competence is vague, though, and the reality is that one might be competent for some purposes, but not for others. One must begin thinking about competence among the mentally disabled by considering the extent to which the individual is capable of consenting to sexual contact.¹⁴⁹ This is necessary because an individual who is competent may make their own decisions about sexual activity and reproduction; if they are incompetent, however, then sexual activity with them is a crime.¹⁵⁰

146. See, e.g., S. Matthew Liao, Julian Savulescu & Mark Sheeha, *The Ashley Treatment: Best Interests, Convenience, and Parental Decision-making*, 37 *The Hastings Center Report* 16 (2007) (discussing a case involving hormonal treatment administered to prevent the biological maturation of a profoundly physically and developmentally disabled adolescent).

147. Elizabeth J. Reed, Note, *Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity*, 83 *Va. L. Rev.* 799, 806-07 (1999).

148. *Id.* at 801-02.

149. See Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 *U. Ill. L. Rev.* 315, 341-55 (1997), for an enlightening and thorough discussion of this issue. Professor Denno catalogues state legislative standards for determining when a mentally retarded individual may legally consent to sex. She criticizes the laws for creating overly paternalistic standards of consent meant to criminalize sex with mentally disabled women, in particular, thus denying their sexual autonomy. She also criticizes state laws for providing vague consent tests, but no guidance for judges on how to apply the tests.

150. Indeed, one of the problems with the sterilization of mentally incompetent individuals, particularly those at high risk of sexual abuse such as those who are institutionalized, is that in so doing, one may mask the evidence of rape, making it more difficult to prosecute sexual predators who prey on this population.

Sexual activity occurs among the mentally disabled regardless of their capacity to consent.¹⁵¹ At the same time, research suggests that these individuals are disproportionately vulnerable to manipulation and coercion¹⁵² and are more likely than the general population to experience sexual assault, although they might not identify it as such.¹⁵³

Sexual activity among mentally disabled individuals also triggers concerns that compel the involvement, at least at a preliminary level, of medical and legal professionals. Medical experts must evaluate the individual's capacity to consent to sex and to make informed decisions regarding contraception and pregnancy. They must further evaluate the individual's capacity to consent to sterilization, or to make sound decisions regarding prenatal care or abortion. In the event that an individual is incompetent to make these decisions, the law must identify a surrogate decision-maker, appointed to render decisions on that individual's behalf.

Ostensibly, the job of the surrogate decision-maker is to render the decision the individual would have made, were she competent to do so herself. Of course, this task becomes nonsensical when applied to a person who never was competent to begin with.¹⁵⁴ In such cases, the decision-maker's task becomes "objective," and requires determining the course of action deemed to be in the ward's best interests. This process is so established in the medical context of decision-making for a host of incompetent patients that one seldom pauses to question the extent to which one person can ever determine another's real best interests. That some families choose to sterilize a disabled relative for eugenic or self-interested reasons does not mean all families will do so; as Lombardo observes, families often request sterilization of a disabled relative for the noblest of intentions.¹⁵⁵ In the realm of sexuality and reproduction for the mentally disabled, for instance, is it in the individual's best interests to

151. See Denno, *supra* n. 149, at 338, n.137, citing Rosalyn Kramer Monat, *Sexuality and the Mentally Retarded: A Clinical and Therapeutic Guidebook* 58-59 (College Hill Press 1982). See generally Elizabeth Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 Duke L.J. 806 (1986).

152. The National Association for Retarded Citizens statistics regarding rates of sexual assault among mentally disabled individuals show that they are more vulnerable to assault. For example, a 2000 Nebraska study found mentally disabled children were four times more likely to be sexually abused than were non-mentally disabled children. Leigh Ann Davis, *The ARC Q&A: People with Intellectual Disabilities and Sexual Violence*, www.thearc.org, August 2005, <http://www.thearc.org/NetCommunity/Document.Doc?&id=155> (last visited Dec. 10, 2009).

153. A tragic and famous example is the 1989 "Glen Ridge assault," in which a group of teenage boys lured a mildly retarded teenage girl into a basement where they asked her to perform sexual acts and inserted objects into her vagina. In re B.G., 589 A.2d 637 (1991). The girl did not know what rape was and complied with the boys' requests; she later told a swim teacher about the incident only to ask how to say "no" to such requests in the future. In re B.G., 589 A.2d at 640.

154. *Superintendent of Belchertown State School & another v. Saikewicz*, 370 N.E.2d 417 (1977).

155. Lombardo, *supra* note 1, at 268.

experience sexuality? To experience pregnancy? To be able to hold her own baby, even if she lacks the skills to raise it on her own? Further complicating the decision-maker's task is the reality that a family member asked to perform the job of surrogate decision-maker may be conflicted about the extent to which her decision regarding her ward has consequences for her own life. Such consequences, Lombardo points out, should not be dismissed lightly, yet neither should they be exclusively dispositive in authorizing the sterilization of the mentally infirm.¹⁵⁶

In addition to these practical and moral concerns, there is reason to believe that eugenics still informs (or misinforms) decisions regarding whether a mentally disabled individual ought to be sterilized, or to undergo an abortion. Although it is evident that some developmental delays and disabilities are genetically transmitted, there is ample evidence demonstrating that parents with severe disabilities can produce healthy, normal children.¹⁵⁷ Furthermore, even if it were the case that all disabled parents produced similarly disabled offspring, it is not necessarily self-evident that this result is a tragedy to be avoided. One of the most persistent and perhaps most insidious forms of eugenic-based thinking in contemporary society is the tacit assumption, most often seen in prenatal diagnostic testing, that it is better to avoid the birth of disabled individuals than to welcome and accommodate them. I do not mean to suggest that pregnant women should be denied access to prenatal diagnostics, but rather that these tests should not absolve society of the duty to make life easier for disabled individuals and their families.

III. Conclusion

There lies a profound sadness at the core of Lombardo's history of the U.S. government's involvement with and support of sterilization. The story he recounts for us is not simply about lawyers, doctors, and policy-makers who collaborated in a misguided effort to promote their vision of progress. It is also about the emotional significance and the value we place upon one's capacity to reproduce. Lombardo's work helps us to recognize something that should long have been obvious: policies governing reproduction, whether direct or indirect, reflect tacit assumptions about the value the state places on

¹⁵⁶. *Id.*

¹⁵⁷. Even a quick internet search reveals ample evidence of parenting of normal children by disabled parents. *See, e.g.*, <http://www.disabledparents.net> (last visited Mar. 2, 2009). Likewise, not all apparently non-disabled parents will have non-disabled offspring. For example, contrast two relatively common genetically-linked forms of mental retardation: Fragile X syndrome and Down syndrome. Whereas Fragile X syndrome typically is passed from an unaffected mother to her male offspring, <http://www.nlm.nih.gov/medlineplus/fragilexsyndrome.html> (last visited Mar. 2, 2009), current evidence suggests that most cases of Down syndrome are not inherited, but instead, are caused by abnormalities in cell-replication occurring early in fetal development, <http://ghr.nlm.nih.gov/condition=downsyndrome> (last visited Mar. 2, 2009).

the importance of bearing children. More to the point, these various policies demonstrate an enduring sense that, when it comes to the right to enjoy parenthood, some people are more deserving than others.

The words we use to describe the condition of being unable to reproduce seem far too shallow to convey the longing and despair experienced by those who want to have children but who are physically incapable of reproduction. We do not call it “sterility” anymore; one seldom hears someone say: “I am sterile.” Instead, we have optimistically recast it as a medical condition, infertility, which suggests the possibility of treatment and cure, at least for those who can afford it. The truth is, though, that for those who want children but for whatever reason cannot have them, the harsh word “sterile” may come closer to capturing the emotional valence of their reality.

Lombardo forces us to look straight on at Carrie Buck’s grief, and at the grief of countless others who were stripped of their right to reproduce. One cannot but feel ashamed and sickened by the governments that stood in judgment of these individuals and denied them access to what many consider to be one of the most central and transformative of human experiences. It is easy to condemn their actions. But beyond the most obvious cases of governmental abuse of authority lie harder questions about the extent to which there is a fundamental right to be a parent, and whether, if such a right exists, it constricts a government’s ability to make policies that limit its citizens’ free exercise of that right, or indeed, generates affirmative obligations upon a government to assist its citizens in pursuing that right.